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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Sprint Communications Co. L.P. v. North County Communications Corp., File No. EB-14-MD-014

Dear Ms. Dortch:

Sprint Communications Company L.P. ("Sprint") submits this Reply in support of its motion to dismiss the above matter with prejudice.

I. COURT PROCEEDINGS

On September 11, 2015, the District Court issued its Findings of Fact and Conclusions of Law in Case No. 09-cv-2685-CAB (JLB) ("*Findings and Conclusions*"). A copy of that decision is attached hereto as Exhibit 1. The District Court denied NCC recovery on its claim that Sprint breached the parties' contract between February 2008 and May 2010. *Findings and Conclusions*, p. 16. The District Court also denied NCC's claim for breach of the implied covenant of good faith and fair dealing. *Id.* at 17. The District Court found that NCC had breached the parties' agreement but that Sprint's contract damages were barred by the two-year federal statute of limitations. *Id.* at 17-18. "All other causes of action having been dismissed," the District Court directed the Clerk to close the case. *Id.* at 18. Judgment was entered on September 28, 2015.

On October 28, 2015, NCC filed a Notice of Appeal in the United States Court of Appeals for the Ninth Circuit. Sprint filed a notice of cross appeal on November 9, 2015. By order dated May 26, 2017, the Ninth Circuit affirmed the District Court's decision denying NCC's recovery, but reversed the District Court's decision that Sprint's contract damages were barred by the two-year federal statute of limitations ("*Order on First Appeal*"). A copy of that decision is attached hereto as Exhibit 2. The Court remanded the case to the District Court with the sole mandate to determine Sprint's damages and enter judgment. *Id.*

On remand, the District Court entered judgment in Sprint's favor in the amount of \$2,873,140.67 ("*Order on Remand*"). A copy of that decision is attached hereto as Exhibit 3. As noted therein,

NCC asked the District Court to stay entry of judgment, claiming that it had yet to litigate certain equitable claims. NCC argued that those equitable claims were still alive and would be tried after the Commission acted on the Court's earlier referral. The District Court disagreed, holding that all claims were dismissed and there was nothing left to litigate:

The Court disagrees with NCC's characterization of the posture of this case. The judgment from which NCC appealed was clear that it was final and that it resolved all remaining claims in the case, because all other claims had been dismissed. Had there been a bifurcation with remaining claims to be resolved notwithstanding the bench trial, the judgment would not have been final and the Court would not have ordered that this case be closed. Further, if NCC believed that additional claims had not been dismissed and still needed to be resolved, it was obligated to raise that issue with this Court before appealing, or at a minimum, raise the issue on appeal. NCC did neither.

Order on Remand, p. 3 (emphasis added).

NCC appealed again, arguing that the District Court erred by incorrectly determining that all claims had been dismissed. NCC Feb. 1, 2018 Brief, p. 1 (attached hereto as Exhibit 4). NCC continued to press its argument that the underlying case was not over, and that it had some claims that remained to be litigated. *Id.*

The Ninth Circuit rejected NCC's second appeal, affirming "for the reasons stated by the District Court." June 28, 2018 Ninth Circuit Order on Second Appeal (attached hereto as Exhibit 5). NCC urged rehearing, which was denied on July 16, 2018. All appeals have been exhausted.

II. THE COMMISSION LACKS JURISDICTION TO TAKE ACTION ON SPRINT'S COMPLAINT

Sprint's motion to dismiss should be granted because the Commission lacks continuing jurisdiction to adjudicate Sprint's Formal Complaint that was filed with the Commission in 2014. In 2013, when the District Court issued its referral, it dismissed the affected claims without prejudice. The claims dismissed without prejudice were NCC's equitable claims and Sprint's claims that NCC violated the Communications Act. *See* Sprint's Formal Complaint, ¶ 180. The District Court has now entered final judgment resolving all claims and closed the case, and the Ninth Circuit has affirmed that action. The underlying case is over.

This case before the Commission was initiated by Sprint's Formal Complaint, which Sprint filed in furtherance of a referral order in what was then a pending case. While Sprint's Formal Complaint stated claims already pled in federal court – thereby raising issues under 47 U.S.C. § 207 – the Formal Complaint was not subject to dismissal because it was filed to effectuate a referral order. The Commission regularly accepts jurisdiction over such complaints when necessary to respond to a referral in a pending case, prior to entry of a final order. *See AT&T Corp. v. All Am. Tel. Co.*, Memorandum Op. & Order, 30 FCC Rcd 8958, ¶ 7 (2015) (stating that Section 207 "does not apply in the context of a primary jurisdiction referral," and holding that "nothing prevents the Court from seeking the Commission's guidance prior to entering a final order" (emphasis added)).

Now, however, there is no pending case. A final judgment has been entered resolving all claims that were brought or could have been brought, and every possible appeal has been exhausted. In light of the resolution of all claims in the parties' chosen forum – federal court – the Commission lacks jurisdiction under Section 207 to take any further action. Nor would such action be in furtherance of a Court's referral order because that referring court has said, in no uncertain terms, that the case is over.

NCC does not appear to dispute that the underlying case is over. Instead, NCC claims that it "intends to renew" certain claims at some point in the future. NCC Nov. 21 Objection, p. 2. It is not clear what that means, or how that would be done. If NCC thinks it will successfully file a new complaint in federal court asserting its now dismissed equitable claims, it is sorely mistaken. The District Court held, and the Ninth Circuit affirmed, that NCC's claims have all been dismissed and reduced to final judgment. Principles of *res judicata* and collateral estoppel prohibit NCC from bringing a new case on claims that were, or could have been, brought in the earlier litigation. *See Kremer v. Chem. Const. Corp.*, 456 US. 461, 487 (1982) ("In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum.").

But even if NCC might have some avenue to bring a new action, it would be up to that future Court to determine what claims could proceed, whether a referral was appropriate, and what issues would be referred. At present, Commission action on Sprint's Formal Complaint would represent nothing more than an advisory opinion related to claims that are not pending and (if ever filed) will not survive a motion to dismiss.

Because there is nothing further that the Commission can or should do, Sprint's Motion to Dismiss should be granted.

Very truly yours,



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